

# Mind the Gap: The Indirect Relation between Ends and Means in American Property Law

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# RESPONSE

## MIND THE GAP: THE INDIRECT RELATION BETWEEN ENDS AND MEANS IN AMERICAN PROPERTY LAW

Henry E. Smith†

INTRODUCTION .....	959
I. FLOURISHING AND ITS OBLIGATIONS .....	960
II. HOW PROPERTY FILLS THE GAP .....	963
III. CORE AND PERIPHERY IN PROPERTY LAW .....	971
A. The Morality of Property .....	971
B. False Dichotomies in Property Mechanisms .....	975
C. More Is Less: Law Versus Equity .....	977
IV. APPLICATIONS .....	980
CONCLUSION .....	988

### INTRODUCTION

More than most areas of law, property causes impatience. Most of us have a sense that property is doing something important, but it does it in a somewhat mysterious way. Yes, laypeople have a clear sense of who owns what, and scholars can more or less expound the welter of rules that come under the heading of “property.” But to many, the fact that much of the time property tells some people that they can tell other people to keep out seems selfish and rude, and more or less unrelated to the purposes for which we have property in the first place. We, speaking of course on behalf of society, have a clearer sense of what property is supposed to do than how it is supposed to do it. Gregory Alexander’s *The Social-Obligation Norm in American Property Law* shares these strengths and weaknesses.<sup>1</sup> Its virtue is in being very clear about purposes, but its focus on ends ultimately undermines its account of and justification for its chosen means.

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† Professor of Law, Harvard Law School. I would like to thank Bob Ellickson and Carol Rose for their helpful comments. All errors are directly mine.

<sup>1</sup> Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009).

## I

## FLOURISHING AND ITS OBLIGATIONS

Professor Alexander's article convincingly argues for an inspiring moral vision of the interests served by property. He most basically argues for the primacy of human flourishing and specifically taps into the capabilities approach developed by Martha Nussbaum and Amartya Sen.<sup>2</sup> Like Eduardo Peñalver's invocation of virtue ethics in this issue,<sup>3</sup> Alexander's reliance on human flourishing can be located in a broad constellation of multivalue theories: there are multiple types of capabilities (or virtues) that need to be promoted that cannot be compared or traded off directly against each other in any fully specifiable way. It is hard to be against human flourishing, and a concept that is in one form or another central to Aristotle,<sup>4</sup> Aquinas,<sup>5</sup> Catholic social thought,<sup>6</sup> modern virtue ethics,<sup>7</sup> some forms of natural law,<sup>8</sup> and the capabilities approach<sup>9</sup> must have something going for it, but one can question the degree of consensus required for implementation in a legal regime. In particular, I want to suggest that some of the approaches that Alexander lumps together as opposed to the social-obligation approach—usually under the banner of law and economics—are not so much incompatible with human flourishing as an end but instead disagree on the means to get there.

In general terms, one means for promoting human flourishing that Alexander emphasizes is imposing a set of obligations on owners.

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<sup>2</sup> See, e.g., MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000); AMARTYA SEN, *COMMODITIES AND CAPABILITIES* (1985); AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999); Alexander, *supra* note 1, at 762–65; see also *THE QUALITY OF LIFE* (Martha C. Nussbaum & Amartya Sen eds., 1993) (evaluating different standards and conceptions of quality of life).

<sup>3</sup> Eduardo Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009).

<sup>4</sup> ARISTOTLE, *NICOMACHEAN ETHICS* bk. VIII, ch. 13, § 6 (Terence Irwin trans., Hackett Publ'g Co. 2d ed. 1999) (n.d.).

<sup>5</sup> 1 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* pt. I, q. 2, art. 3 (Fathers of the English Dominican Province trans., Benziger Bros. 2d revised ed. 1920) (1265–1273).

<sup>6</sup> See, e.g., CAN. CONF. OF CATHOLIC BISHOPS, *A PASTORAL LETTER ON THE CHRISTIAN ECOLOGICAL IMPERATIVE FROM THE SOCIAL AFFAIRS COMMISSION* para. 7 (2003), available at <http://www.cccb.ca/site/Files/pastoralenvironment.pdf> (“[I]n Catholic social thought, the common good should be conceived as the sustenance and flourishing of life for all beings and for future generations.”); Mark A. Sargent, *Utility, the Good and Civic Happiness: A Catholic Critique of Law and Economics*, 44 J. CATH. LEGAL STUD. 35, 52 (2005); see also MICHAEL NOVAK, *THE CATHOLIC ETHIC AND THE SPIRIT OF CAPITALISM* 147–68 (1993) (critiquing current versions of Catholic social thought and developing Catholic social ethic including an account of human flourishing).

<sup>7</sup> See, e.g., ROSALIND HURSTHOUSE, *ON VIRTUE ETHICS* (1999); ALASDAIR MACINTYRE *AFTER VIRTUE: A STUDY IN MORAL THEORY* (Univ. Notre Dame Press 3d ed. 2007) (1981); PHILIPPA FOOT, *Virtues and Vices*, in *VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY* 1, 1 (2002); Peñalver, *supra* note 3, at 864–66.

<sup>8</sup> See, e.g., JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980); Robert P. George, *Natural Law*, 31 HARV. J.L. & PUB. POL'Y 171, 172 (2008).

<sup>9</sup> See sources cited *supra* note 2.

Alexander sees this as one overarching obligation, or obligation norm, that owners must furnish others the means to flourish if their property has a sufficient nexus to the need.<sup>10</sup> Unfortunately, Alexander does not tell us with much specificity what constitutes such a nexus. Instead, he believes that such questions should not be answered in an “up-front and across-the-board” way at all.<sup>11</sup> Only when the needs of specific people (or types of people) come into view can we evaluate their needs in terms of the nexus required between those needs and the property in question. Presumably, the greater and more dire the need, the more attenuated the connection between that need and the property we can tolerate. Thus, even in the doctrine of necessity, the individual claiming necessity may do so even if the owner whose property is being used has not done anything to cause the necessity.<sup>12</sup> In the prototypical situations of a person trapped on a snowy mountain needing the food in the vacant cabin or the ship about to be caught in the storm next to an unoccupied dock, the cabin or dock owner did not cause the blizzard or the storm—or the hiker’s hunger or the ship’s susceptibility to sink. Nevertheless, the proximity and the lack of better alternatives make such emergencies come within the narrow necessity doctrine.<sup>13</sup>

Alexander would like to see this approach widened considerably, so that owners of historic buildings are obligated not to destroy important aspects of a common culture<sup>14</sup> and owners of beaches are obligated to welcome in the public for recreational purposes.<sup>15</sup> Flourishing requires aesthetically pleasing old buildings and public beaches. What is less clear is why the owners of those buildings and beaches should provide them at personal expense, rather than the government funding them by taxing other comparably wealthy citizens. One candidate for nexus Alexander does rule out: unlike Hanoch Dagan, Alexander is not looking for some generalized or even attenuated version of reciprocity of advantage.<sup>16</sup> Under the social-obligation norm, we need not assure ourselves that the owners of Grand

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<sup>10</sup> Alexander, *supra* note 1, at 780, 781–82, 795–96, 798–99, 807–08.

<sup>11</sup> *Id.* at 751.

<sup>12</sup> See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 24, at 146–48 (5th ed. 1984); Henry E. Smith, *Self-Help and the Nature of Property*, 1 J.L. ECON. & POL’Y 69, 83, 91 (2005).

<sup>13</sup> See KEETON ET AL., *supra* note 12, § 24, at 146–47. Necessity also permits individuals to engage in routine small-scale invasions like retrieving wandering pet cats and stepping onto a parcel to avoid an obstruction in a road. See RESTATEMENT (SECOND) OF TORTS § 197 cmt. c (1965).

<sup>14</sup> Alexander, *supra* note 1, at 791–92, 794–96.

<sup>15</sup> *Id.* at 804–07.

<sup>16</sup> *Id.* Part II; Hanoch Dagan, *Just Compensation, Incentives, and Social Meanings*, 99 MICH. L. REV. 134, 136 (2000) (“A takings doctrine attuned to the virtues of social responsibility and equality . . . should start with a rule of long-term reciprocity of advantage . . .”); see also Hanoch Dagan, *The Social Responsibility of Ownership*, 92 CORNELL L. REV. 1255, 1266

Central Terminal will benefit from increased tourism or share sufficiently from the ambience of New York City before we are comfortable imposing an obligation on them.<sup>17</sup> But the unanswered question from such owners will still be, "Why me?"

Professor Alexander is right that the obligations of ownership often receive too little attention.<sup>18</sup> But he goes further than this. In his view, the appearances that social obligations make in American property law are too sporadic and unsystematic.<sup>19</sup> He believes that property law must instead make constant reference to goals, in particular the goal of human flourishing. He believes that the emphasis on flourishing stands in stark contrast to the conventional law-and-economics approach, which forms a convenient foil.<sup>20</sup> Law and economics does have a tendency (but a decreasing one, I would argue) to adopt a crude, narrowly focused utilitarianism in which individual situations or specific legal rules are evaluated in wealth-maximizing or welfare terms.<sup>21</sup> And Alexander is right that this highly specific utilitarianism is problematic from a moral point of view. For one thing, the atomizing of property rights into sticks in the bundle, which is a characteristic tendency of this version of law and economics, does not accord with lay intuitions about the wrongness of theft.<sup>22</sup> Nor is reciprocity of causation consistent with people's intuitions about who has harmed whom.<sup>23</sup> But I will argue the focus on wealth or welfare maximization is less problematic than it may appear so long as we realize how partial it is in various ways.

I would suggest that the constant reference to ends makes Alexander's social-obligation theory eerily similar to the kind of law and economics he decries. Both Alexander and the narrow version of law and economics he criticizes deny the "gap" between means and ends in property. Law and economics evaluates individual legal rules according to whether they serve the overall maximization of wealth or

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(2007) (discussing long-term reciprocity); Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 771 (1999) (discussing long-term reciprocity and social responsibility).

<sup>17</sup> Alexander, *supra* note 1, at 793–96.

<sup>18</sup> These include the duty to pay taxes and special assessments, the occasional duty to pay restitution for benefits conferred by good faith mistaken improvers, duties of lateral support, duties to control uses that would constitute nuisances, and specific duties to maintain adjacent infrastructure such as trimming overhanging trees and shoveling sidewalks. Landowners and the authors who write for them are aware of these issues. See, e.g., CORA JORDAN, *NEIGHBOR LAW: FENCES, TREES, BOUNDARIES & NOISE* (4th ed. 2001) (describing general duties that landowners are legally obligated to satisfy).

<sup>19</sup> See Alexander, *supra* note 1, at 748.

<sup>20</sup> See *id.* at 748–51.

<sup>21</sup> Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1867 (2007).

<sup>22</sup> *Id.* at 1852–60.

<sup>23</sup> *Id.* at 1860–66.

social welfare.<sup>24</sup> This focus has led law and economics to embrace the bundle-of-rights picture because it conveniently chops up property questions into bite-sized portions, allowing us to frame the analysis in terms of who should be able to do what with respect to the thing in question. For this atomized, bundle-based view, the name of the game is the system of carrots and sticks to which the primary actors will respond, rather than the right to a “thing” that is central to traditional property law (and lay views of property). Sometimes this system of incentives takes the form of *ex post* tweaking of existing property rights, and sometimes the form of highly particularized mechanisms to induce *ex ante* behavior.<sup>25</sup> Although Alexander would like to jettison the bundle-of-rights picture of property,<sup>26</sup> his focus is likewise use by use, conflict by conflict.

Alexander rightly sees ownership as involving obligations as well as rights, but as I will argue, he gives short shrift to the rights aspect of property. Alexander correctly criticizes certain utilitarian approaches associated with law and economics as being too un-attuned to moral questions. He laments that social obligation appears only implicitly in property law and that there is a “gap” between property law and human flourishing. I will argue, however, that far from being problems, this implicitness and gappiness is the strength of a property law that promotes flourishing.

## II

### HOW PROPERTY FILLS THE GAP

Property is an area of law that has gappiness at its core. Exclusion rights serve interests in use only indirectly, but there is a reason for this. Constant reference to these interests would undermine property’s advantages of solving problems wholesale and coordinating the activities of often-anonymous actors. These advantages, to which I return below, are easy to overlook, and Alexander is by no means alone in leaving them out of the picture. Much of the kind of law and economics Alexander takes as his foil likewise treats property as a branch of contract or tort, with no special character as a right to a thing that is good against the world.

What such approaches share with Alexander’s view is a lack of appreciation for the virtue of deciding many questions up front and across the board. Why is the interaction between polluter and resident asymmetrical in the sense that the default package of rights gives a resident the right to be free from pollution but polluters need an

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<sup>24</sup> See Alexander, *supra* note 1, at 748–49.

<sup>25</sup> See *id.* at 750–51.

<sup>26</sup> *Id.* at 800–01.

easement to have the "right to pollute"?<sup>27</sup> Because the default package is lumpy, it sweeps in all sorts of as-yet-unspecified uses and potential interactions and declares the owner the winner—the gatekeeper who can decide who gets to do what. This economizes on information costs for duty holders and officials.<sup>28</sup> But exclusion is a means to an end and not an end in itself, and is far from absolute even as a means. No one except a fetishist would believe that exclusion is a positive good, but the right to exclude indirectly serves a wide—and, crucially, only vaguely specified—set of interests.<sup>29</sup> Because the owner has the right to exclude, the owner usually can use the property for a variety of uses without answering to outsiders. The owner of land can live there, read a book, park his car, and grow crops, etc., without consulting with anyone else. These interests are *why* we want to have property—and they do promote human flourishing—but the whole point of the basic exclusion mechanism is to avoid having to delineate rights directly in terms of these interests.

But the right to exclude is not the end of the story and does not always have the last word.<sup>30</sup> When an issue is important enough and bargains will not or should not happen, then owners' rights must give way to larger social interests. This has happened in such varied contexts as airplane overflights,<sup>31</sup> necessity,<sup>32</sup> and antidiscrimination.<sup>33</sup>

The resulting pattern is that property's core is a right to things against the world, which is a rough first cut at dealing with a wide, indefinite, and open-ended set of problems by delegating decisions over the use of property to owners who have better information about it. But the presumption in favor of this delegation is rebuttable. Where problems are important enough and cannot be solved better in a different way, we start to use more tailored solutions—governance—that make more direct reference to the ends that we collec-

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<sup>27</sup> See Smith, *supra* note 12, at 70–76.

<sup>28</sup> See *id.* at 78–79.

<sup>29</sup> See, e.g., J.W. HARRIS, PROPERTY AND JUSTICE 30–32 (1996) (analyzing property as an "open ended set of use-privileges" protected by "trespassory rules"); J.E. PENNER, THE IDEA OF PROPERTY IN LAW 68–74 (1997); Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453, S469 (2002); Smith, *supra* note 12, at 76–80.

<sup>30</sup> But cf. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 731 (1998) (attempting to reduce much of property to elaborations of the right to exclude).

<sup>31</sup> See, e.g., *United States v. Causby*, 328 U.S. 256, 260 (1942) (discussing how high-altitude flights do not violate landowners' rights under *ad coelum* doctrine); *Hinman v. Pac. Air Transp.*, 84 F.2d 755, 759 (9th Cir. 1936) (affirming dismissal of landowner's claims against airlines in connection with overflights); see also THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 9–15 (2007) (discussing law of airplane overflights).

<sup>32</sup> See, e.g., *Ploof v. Putnam*, 71 A. 188, 189 (Vt. 1908); Smith, *supra* note 12, at 82–83; see also MERRILL & SMITH, *supra* note 31, at 439–42 (discussing law of necessity in property).

<sup>33</sup> See, e.g., Fair Housing Act, 42 U.S.C. §§ 3601–3619 (2000); see also MERRILL & SMITH, *supra* note 31, at 456–80 (discussing antidiscrimination law in property).

tively want to see served.<sup>34</sup> Much argument over property rights revolves around how easily and for what purposes society should override this presumptive delegation to the gatekeeper owner.<sup>35</sup> But regardless of how these questions are answered, the overall structure could be regarded as constructed of a core and periphery—a reality that seems to offend the sensibilities of Alexander and others who would like to see the end of flourishing more in direct view.<sup>36</sup> Or perhaps these scholars believe that every application of a rule or standard expresses an entire world view of individualism or altruism,<sup>37</sup> but sometimes the practicalities dominate—the idea of using *ex post* standards all the time, as Alexander can be read as advocating, would seem to raise information costs to the breaking point. In my view, it is only because the basic exclusionary regime is taken for granted that this core-and-periphery architecture is seen to signal the lack of importance of the interests that come through at the “periphery.” On the contrary, these interests’ importance enables them to come though the heavy gravitational pull of the exclusionary regime generally used to solve the basic need for stability and coordination.

Like many looking for a culprit for the law’s lack of attention to social obligation, Professor Alexander thinks he has found one in law and economics.<sup>38</sup> Specifically, Alexander has in mind the particular strain of law and economics that focuses on any quantity measurable on a single scale such as wealth maximization or social welfare. He further implies that the single-minded pursuit of a scalar value, even if it reflects multiple considerations, elevates markets over community and causes too much deference to owners in pursuit of market values.<sup>39</sup>

Although law and economics can become myopic, its myopia does not necessarily lead to deference to owners. If wealth maximization were the goal, a social planner with good information about wealth would be able to set “prices” or make allocative decisions directly. The issue of whether the government or owners should decide

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<sup>34</sup> See Smith, *supra* note 29, at S454–55 (comparing exclusion and governance).

<sup>35</sup> See Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 1040–45 (2004).

<sup>36</sup> Alexander, *supra* note 1, at 741–48; Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1737 (1976) (describing classical legal theory as concerned with identifying “core” individual legal freedoms and a “periphery” of limitations on those freedoms, and modern legal theory as dissolving the distinction between core and periphery).

<sup>37</sup> Kennedy, *supra* note 36, at 1685 (arguing that, in the private law context, individualists favor rules and altruists favor standards).

<sup>38</sup> See, e.g., ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 225–40, 265–66 (1993) (arguing that law and economics and prudentialism are in conflict).

<sup>39</sup> Alexander, *supra* note 1, at 750–51.



how to maximize the utility of property is reminiscent of the socialist calculation debate about whether a central planner could overcome the information problems inherent in allocating resources in an economy without market prices.<sup>40</sup> In private-law theory, in fact a mini-version of the socialist calculation debate is occurring now with would-be planners devising ever more complicated and sophisticated liability rules that allow officially-determined liability to substitute for the prices that owners protected by property rules (embodied in injunctions and punitive damages) would set on their own.<sup>41</sup> Or liability-rule schemes are devised to induce owners to cough up their information so that we may put it to better collective use.<sup>42</sup> Neither approach is particularly deferential to owners, but an emphasis on increasing the use of liability rules is well within the mainstream of economic analysis.

Instead, it is the new institutionalists,<sup>43</sup> Austrians,<sup>44</sup> assorted libertarians,<sup>45</sup> and Burkeans willing to use economic analysis as a tool<sup>46</sup> who argue for more delegation to owners and stronger property-rule protection. They are joined by many non-law and economics schools of thought that have often defended the merits of property rules.

<sup>40</sup> Compare H.D. DICKINSON, *ECONOMICS OF SOCIALISM* (1939), and Oskar Lange, *On the Economic Theory of Socialism* (1936–37), reprinted in *ON THE ECONOMIC THEORY OF SOCIALISM* 57 (Benjamin E. Lippincott ed., 1938) (describing methods for implementing a successful socialist economy), with LUDWIG VON MISES, *SOCIALISM: AN ECONOMIC AND SOCIOLOGICAL ANALYSIS* 137–42 (J. Kahane trans., Yale Univ. Press rev. ed. 1951) (1922), and F.A. v. Hayek, *Socialist Calculation: The Competitive Solution*, 7 *ECONOMICA* 125 (1940) [hereinafter Hayek, *Socialist Calculation*], and F.A. Hayek, *The Use of Knowledge in Society*, 35 *AM. ECON. REV.* 519, 529 n.1 (1945) [hereinafter Hayek, *Knowledge*]. See generally DON LAVOIE, *RIVALRY AND CENTRAL PLANNING: THE SOCIALIST CALCULATION DEBATE RECONSIDERED* (1985) (summarizing major arguments about the viability of a centrally planned economy); Robert Heilbroner, *Analysis and Vision in the History of Monetary Economic Thought*, 28 *J. ECON. LITERATURE* 1097, 1097–98 (1990) (acknowledging that capitalism ultimately won in the real world but that “the successes of the farsighted seem accounted for more by their prescient ‘visions’ than by their superior analyses”).

<sup>41</sup> This is cheerfully admitted in Ian Ayres & Paul M. Goldbart, *Optimal Delegation and Decoupling in the Design of Liability Rules*, 100 *MICH. L. REV.* 1, 51–54 (2001).

<sup>42</sup> See, e.g., IAN AYRES, *OPTIONAL LAW: THE STRUCTURE OF LEGAL ENTITLEMENTS* (2005); Ayres & Goldbart, *supra* note 41, at 76; Madeline Morris, *The Structure of Entitlements*, 78 *CORNELL L. REV.* 822, 854–56 (1993).

<sup>43</sup> See Henry E. Smith, *Property and Property Rules*, 79 *N.Y.U. L. REV.* 1719, 1727 (2004) (arguing for information cost advantages of property rules).

<sup>44</sup> See, e.g., Hayek, *Socialist Calculation*, *supra* note 40; Hayek, *Knowledge*, *supra* note 40; see also Christopher T. Wonnell, *Contract Law and the Austrian School of Economics*, 54 *FORDHAM L. REV.* 507 (1986) (using approach of the Austrian School—which holds that markets are necessary to overcome imperfect information in order to set prices—to analyze contract law).

<sup>45</sup> Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 *YALE L.J.* 2091, 2103–05 (1997) (arguing that a rule allowing courts to require a property owner to pay to enjoin a nuisance results in a “massive destabilization of property rights”).

<sup>46</sup> Smith, *supra* note 43, at 1723–24.

Feminist scholars have been at the forefront in questioning the increasing hegemony of the often paired liability-rule paradigm and bundle-of-rights picture of property.<sup>47</sup> A heavy emphasis on protecting exclusion rights even in the absence of demonstrated harm (the classic trespass paradigm) has also been defended in Kantian terms.<sup>48</sup> Indeed, although examining it would take us too far afield, I would expect that the basic architecture of property law—a core consisting of exclusion rights with no-questions-asked liability and a periphery consisting of increasing numbers of governance rules subject to ongoing revision—is characteristic of a range of consequentialist, deontological, and eudaimonistic theories that take seriously basic problems of implementation such as information and complexity.<sup>49</sup>

Thus mainstream law and economics sometimes has a narrower view of the purpose of property and other legal institutions, but it, like Alexander, is single-minded in its focus on those ends. As a result, both mainstream law and economics and Alexander tend to elide the costs of setting up the mechanism—the means to those ends—one way rather than another way. Everyone, it seems, is looking for the “right” answer on one side—the benefit or purpose side—of the ledger (if that is the right metaphor), while overlooking information costs. Theories that keep ends in constant collective view tend to find the owner’s gatekeeping dispensable, possibly even altogether unnecessary. Again, Alexander disclaims any *ex ante* across-the-board decision making. But this is the very purpose of the (presumptive) exclusion regime. This is what makes property not only a *right* in the first place but a special one in that it sweeps in a large and indefinite class of interests. It permits owners to determine a large swath of interests their property will serve. We reserve collective determinations of the right answer for issues where we think that we are collectively more likely to find the right answer and where finding that right answer is important enough to override a property owner’s presumptive rights.

Alexander accuses others, especially in law and economics, of “begging the question,” with a futile focus on harms and benefits.<sup>50</sup> But we need to know the right question before we can be said to be

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<sup>47</sup> See, e.g., Jeanne L. Schroeder, *Three’s a Crowd: A Feminist Critique of Calabresi and Melamed’s One View of the Cathedral*, 84 CORNELL L. REV. 394, 412–17 (1999) (providing feminist critique of view that liability rules and property rules are alternate methods of protecting same entitlement).

<sup>48</sup> See Arthur Ripstein, *Beyond the Harm Principle*, 34 PHIL. & PUB. AFF. 215, 216 n.1, 218 (2006).

<sup>49</sup> As Eric Claeys points out, eudaimonistic theories belong to a cross-cutting category, and a eudaimonistic approach can dovetail with a core of exclusion in property. See Eric R. Claeys, *Virtue and Rights in American Property Law*, 94 CORNELL L. REV. 889, 909 (2009).

<sup>50</sup> Alexander, *supra* note 1, at 798–800.

begging it. Alexander is right that a freefloating inquiry into harms and benefits doesn't get us very far.<sup>51</sup> And he is quite right that the bundle-of-rights metaphor isn't all that helpful (he would abandon it altogether, although I think it has limited usefulness).<sup>52</sup> But his question about what obligations we owe society isn't the right—or rather is *a* right but not *the* right or only—question either. The traditional, and I think the correct, question is whether a problem is too large and too hard to solve any other way such that the presumption in favor of property's core right to exclude has to give way to some kind of collective regulation, as is the case for airplane overflights, necessity, and antidiscrimination, among other areas. Alexander's theory, like much law-and-economics scholarship, exhibits a lack of respect for the robustness of the core of an owner's property right, which is best regarded not as absolute but as carrying heavy presumptive force. How much presumptive force that should be is a worthy topic for debate, but zero presumption is unrealistic and would be a practical nightmare.<sup>53</sup>

Professor Alexander assumes that collectively we have to be able to get every compromise between aspects of human flourishing correct, and that if we cannot make an appropriate *ex ante* decision, we must reserve decisions until they can be made *ex post*. This ignores the benefits of simple *ex ante* baselines. It also shares with the bundle-of-rights theory and welfarism an issue-by-issue focus on getting the "right" answer to use conflicts as if such conflicts posed one long test, instead of a complex interaction in which no one decision maker can possess or act on all the relevant information.<sup>54</sup>

It is because the world of interactions is so complex that modular solutions must be on the table.<sup>55</sup> Property, particularly in its core right to exclude, allows a lot of what goes on internal to the property to be of concern only to the owner. If I see a car parked in a parking lot, I know not to take it whether it is owned by a person or a corporation, whether the owner is virtuous or not, and whether the car is on loan from the owner to someone else.<sup>56</sup> If I don't own Blackacre, most of the time I know to keep off regardless of what the owner's uses and plans are for the land. Where all this keeping off is not

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<sup>51</sup> *Id.* at 754, 798–99.

<sup>52</sup> *Id.* at 800–01.

<sup>53</sup> Perhaps some—emphatically not Professor Alexander—might argue that the current presumption is too strong but one could strategically deny it entirely in an attempt to weaken it. But this argument comes perilously close to the "noble lie," which really has no place in an academic discussion, or in my view, in any kind of rational discussion at all.

<sup>54</sup> Hayek, *Knowledge*, *supra* note 40, at 519–20.

<sup>55</sup> Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1751 (2007).

<sup>56</sup> PENNER, *supra* note 29, at 75–76.

enough, governance rules form the interface between one owner and another and can be supplied by contract or by the law off the rack.<sup>57</sup> We as outsiders find it hard to evaluate what owners do and why, but we know that on average owners are good at choosing uses over a large range, so it makes sense to make ownership a black box for some purposes and reserve micro-managing the “interdependencies” to a defined interface.<sup>58</sup> Moreover, the need for the system to evolve may require modularization, and it is tricky to know to what extent remodularization should be delegated to owners or undertaken collectively. Property law provides the overall structure to manage the complexity that Alexander rightly emphasizes, but the need to manage complexity points to the need, at least in theory, for a modular solution. If so, his considerations lead in practice exactly away from his skepticism toward delegation to owners. Ultimately, what degree and kind of modularization we need is an empirical question.

To subscribe to this view is not to elevate the market over everything else. Property rules and deference to owners will generally promote markets sometimes, but sometimes they won't. Living without some seemingly wealth-promoting transactions is the price we pay for living in a stable and humane society that manages complexity through decentralization to property owners. Within law and economics, fans of liability rules and eminent domain, especially for economic development takings,<sup>59</sup> seem to forget that the optimal amount of successful holding out is probably not zero once we take into account the costs of institutional responses to holdouts. Sometimes we will have to let worthy projects be stopped by holdouts, and part of the reality of transaction costs is that some imperfections from holdouts must remain; markets and their liability-rule substitutes cannot achieve the benchmark zero-transaction-cost-world result.<sup>60</sup> Markets may play an essential role in that decentralization but they are not the be all and end all of property's delegation to owners. In a sense, only owners ultimately know.

Why do Alexander and mainstream law and economics downplay the virtues of *ex ante* (rebuttable) presumptive rights of property owners? They are easy to overlook. First, the indirectness of the relationship between exclusion and the interest it serves makes the connection easy to ignore. Second, the analytical spirit finds it congenial to focus on individual rules and justify them or criticize them on

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<sup>57</sup> Smith, *supra* note 55, at 1764–66.

<sup>58</sup> *Id.* at 1748, 1765.

<sup>59</sup> *Kelo v. City of New London*, 545 U.S. 469, 485 (2005) (holding that economic development can satisfy the public-use requirement for eminent domain under the Takings Clause).

<sup>60</sup> R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15–16 (1960); Deirdre McCloskey, *The So-Called Coase Theorem*, 24 E. ECON. J. 367, 370 (1998).

whatever grounds we accept as their purposes. But I am arguing that property's benefits not just of stability and incentive-giving but also of coordination in a complex world are emergent properties of the entire property system. If so, it is fallacious to expect any given decision or rule or feature of the property system to partake of the desirable feature of the whole. To expect every application of property law or every owner's exercise of her rights to pass some societal test—whether it be wealth maximization or flourishing of the community's members—is to commit the fallacy of division, of inferring that parts of a whole share the properties of the whole.<sup>61</sup> Water molecules are not “wet” but a body of water is; property may promote human flourishing even if not every rule or decision on the part of courts or parties, such as an invocation of trespass, directly (or best) promotes human flourishing. Moreover, as emergent properties, stability and coordination cannot be simply added as a balancing factor to the *ex post* mix, as Alexander believes.<sup>62</sup> Third, talking about ultimate ends is more glamorous than asking the more engineering-like question of how to serve them. But if there is anything legal scholars do better than economists, social scientists, and philosophers, it is institutional design. (And it is easy to be cynical and say that any concession to practicality is a cloak for ulterior motives, but again I take this as an argument to diminish the presumption for owner delegation rather than to abolish it.) We should embrace our role.

Finally, the aspects of property I am emphasizing can be regarded as yesterday's news. The lack of deference to owners is most apparent in societies that have not solved the basic problem of social order or have a pathological type of hyper-order (think North Korea).<sup>63</sup> The more refined problems that consume most of the attention of law schools, law firms, markets, and even courts are at the apex of a pyramid with more basic property features like rights to exclude at their base.<sup>64</sup> Most of the time this is a good allocation of our time: the marginal benefit—whether measured on one scale or more pluralisti-

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<sup>61</sup> STEPHEN TOULMIN ET AL., *AN INTRODUCTION TO REASONING* 171–72 (2d ed. 1984).

<sup>62</sup> The idea that an analysis “takes account” of a value as long as it is one of the factors thrown into the balancing exercise rests on a lot dubious assumptions. For one thing, an emergent property of a system may not be subject to control by introducing a “factor” with that label. Thus, the idea that one can promote stability and coordination by introducing a factor “corresponding” to them may not be possible. Furthermore, the balancing that Alexander envisions partakes of the idea that more information is always better, but this can fail to be true, especially in complex systems. See, e.g., 1 CARLISS Y. BALDWIN & KIM B. CLARK, *DESIGN RULES: THE POWER OF MODULARITY* 5 (2000); GERD GIGERENZER, *RATIONALITY FOR MORTALS: HOW PEOPLE COPE WITH UNCERTAINTY* 6 (2008); Ronald A. Heiner, *The Origin of Predictable Behavior*, 73 AM. ECON. REV. 560, 565–67 (1983).

<sup>63</sup> See Daron Acemoglu et al., *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369, 1369 (2001).

<sup>64</sup> Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 397–98 (2001).

cally—from focusing on these challenging problems is greater than rehearsing the point of the basic property regime. It is natural to believe that what we think about is all there is. But when we forget the virtues of the basic setup it becomes valuable to explore them anew.

### III

#### CORE AND PERIPHERY IN PROPERTY LAW

Part of the problem for those like Alexander, who have particular ends constantly in view for property law, is that those ends appear only sporadically, and worse, those appearances are limited to the “periphery” of property law. But referring constantly to ultimate ends is costly and is reserved for high-stakes situations where other mechanisms do not work so well. This is not a measure of the unimportance of these “exceptions” at the “periphery” but reflects their importance—we are willing to accommodate them in what is otherwise a very robust institution that prevents social chaos and allows for a widespread basic coordination.

#### A. The Morality of Property

Those, including Alexander, who would like to see property respond more to social obligation, from the Realists onward, often invoke the traditional maxim, *sic utere tuo ut alienum non laedas* (use what is yours in such a way as not to injure that of others).<sup>65</sup> This was the touchstone of nuisance law, but although it gives us assurance that the social-obligation idea is not altogether new, property law reflects a structure of morality that not coincidentally reflects the core of exclusion and the refinements in terms of governance.<sup>66</sup>

At its core, property draws on an everyday morality that it is wrong to steal and violate others’ exclusion rights. Because property requires coordination between large numbers of anonymous and far-flung people, there are good information-cost reasons for relying on simple lay moral intuitions when it comes to the basic setup of property. This does not mean that information costs are the only reasons for setting things up this way, but an information-cost theory is compatible with a large range of moral theories other than a narrow case-by-case utilitarianism that disregards this basic problem of information and morality.<sup>67</sup> Thus, use balancing is reserved for situations of high stakes in which other solutions (like contracts) are not likely to work.<sup>68</sup> And it is in these contexts that property shifts to balancing and *sic utere*—an alternative moral vision that is appropriate to this

<sup>65</sup> Alexander, *supra* note 1, at 746–47.

<sup>66</sup> Merrill & Smith, *supra* note 21, at 1890–91; Smith, *supra* note 35, at 1004–07.

<sup>67</sup> See Merrill & Smith, *supra* note 21, at 1856–57.

<sup>68</sup> See Smith, *supra* note 35, at 980–82, 995–96.

more personal context. An economic account like this does not require a philosophical commitment to one overriding value. Interestingly, despite its rejection of single-scalar theories of value, Alexander's theory's constant reference to ends resembles case-by-case utilitarianism's approach to the basic architecture of property.

This architecture still leaves us with the core-and-periphery pattern that is offensive to Alexander. Like Duncan Kennedy, whose imagery he invokes here, Professor Alexander seems to believe that property law relies too heavily on rules and formalism and is therefore too excessively individualist as opposed to standards that would allow the law to reflect altruism (or social obligation).<sup>69</sup> Assuming for the sake of argument that the law should reflect social obligation more, it should be easier to override the advantages of exclusion rights (in terms of their own morality and information costs) in some areas than in others. This is likely to begin with areas like nuisance and the existing necessity doctrine, i.e., at the periphery. As we take these kinds of problems more seriously, or diminish the importance of the basic exclusionary setup, the "periphery" expands at the expense of the core. Only if other considerations dominate the core problems of social order, coordination, and stability—considerations served by simple rules of exclusion—should the need for those basic rules disappear. Even then, it is an open question whether to devise more governance rules or to substitute toward more fine-grained private parcels instead.<sup>70</sup> Ultimately, these are empirical questions. Identifying exclusion with individualism and selfishness (which the repeated reference to the narrowest versions of the rational actor paradigm may be designed to suggest) is merely an exercise in name calling. In other words, even if one accepts a particular vision of human flourishing as the goal for property law—or social institutions more generally—one still has to work out how all these considerations come together, and importantly whether we should make some of those decisions up front and across the board in terms of presumptive rights of exclusion.

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<sup>69</sup> See Kennedy, *supra* note 36, at 1685.

<sup>70</sup> See Smith, *supra* note 29, at S475–77. Examples include enclosure, which may have increased output but sometimes at the expense of those with informal rights. See, e.g., THRAÏNN EGGERTSSON, ECONOMIC BEHAVIOR AND INSTITUTIONS § 7.4.1, at 221–23 (1990); E.P. THOMPSON, CUSTOMS IN COMMON 97–184 (1991); J.A. YELLING, COMMON FIELD AND ENCLOSURE IN ENGLAND: 1450–1850, at 1–10 (1977); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1391–92 (1993); Donald N. McCloskey, *The Economics of Enclosure: A Market Analysis*, in EUROPEAN PEASANTS AND THEIR MARKETS: ESSAYS IN AGRARIAN ECONOMIC HISTORY 123, 142–51 (William N. Parker & Eric L. Jones eds., 1975). Recently, tradable permits represent a fine-grained parcelization in response to large scale problems. See, e.g., Carol M. Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 DUKE L.J. 1, 9–36.

At this point one common answer might be that the redistribution Alexander would like to see in property law is better achieved through the tax and transfer system. A lively debate has been joined over whether using substantive legal rules for redistribution is more distortionary than similar levels of redistribution in the tax and transfer system.<sup>71</sup> But I'd like to suggest that information costs and the problem of complexity are reasons we have different areas of law, and that, despite decades of legal realism and post-realist skepticism, areas of law do retain their distinct identities. Perhaps law itself has a modular structure and it manages complexity by allowing some areas to specialize in some problems without constant reference to what is going on elsewhere. From this point of view, it is an open question whether the amount of redistribution we'd collectively like would be best handled in some modules than others, or more globally as a feature of all parts of the system.

Perhaps the main lesson from law and economics is that ideal benchmarks are not the whole story, but any proposed alternative must be evaluated against the other plausible contenders.<sup>72</sup> This is not to argue that the mechanism of property is merely a plumbing problem unrelated to moral considerations. Far from it. Morality is quite related to the mechanism, but it too points to core and periphery. Property, as it comes down to us in tradition, is a collective good that promotes human flourishing, and we need to be a little more careful than legal scholars are inclined to be when we suggest overturning the basic architecture of that system. For this reason, pure solutions ("corner solutions" to economists) offered by low-level utili-

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<sup>71</sup> Compare Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 993–94, 1126 (2001) (claiming that legal rules do little to affect income distributions, and that income tax and transfer programs more effectively redistribute resources), and Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821, 821–22 (2000) (maintaining that legal rules should not be adjusted to redistribute in favor of the poor), and Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667 (1994) (arguing that legal rules generally achieve redistributive goals less efficiently than income taxes), with Ronen Avraham et al., *Revisiting the Roles of Legal Rules and Tax Rules in Income Redistribution: A Response to Kaplow & Shavell*, 89 IOWA L. REV. 1125, 1129 (2004) (arguing against Kaplow and Shavell's assumptions that social planners have complete information and claiming that populations are homogenous with respect to capacity to earn income and avoid injury), and Chris William Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003, 1008–10 (2001) (responding to specific criticisms of the use of legal rules to redistribute resources), and Chris William Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable Approach*, 29 J. LEGAL STUD. 797, 798 (2000) (asserting that legal rules can be modified to serve redistributive goals).

<sup>72</sup> This is sometimes termed avoidance of the "nirvana" fallacy, see Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1–4 (1969), and is related to the theory of the second best, see R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11, 11–12 (1956).



tarianism and an exclusive focus on social obligations—though they disagree on the nature of the goals property should promote—are missing something in their focus on goals alone. Put another way, when architectural considerations are evaluated, utilitarians should be forced to higher levels and more general rules. Likewise, I would argue that the architecture of a property law like ours is not only consistent with a system that promotes human flourishing, but that the core and periphery of property law work together as an important “infrastructure” to promote human flourishing.<sup>73</sup> Crucially, however, it does so by making some decisions up front and across the board.

Whether decisions are made up front and owners are given some deference is quite separate from whether one accepts utilitarianism, and I have suggested that narrow utilitarianism tends to counsel in favor of overriding owners’ wishes. The crude utilitarianism Alexander sees in law and economics still bothers him. But what really is the role of utilitarian-speak in economics, and law and economics in particular? Undoubtedly, one can find convinced utilitarians and consequentialists, but I suspect for many, including myself, utilitarianism is a method of communication more than anything else. Law, like communication generally, is subject to a tradeoff between communicating intensively with close-knit audiences with common knowledge and with extensive audiences in a more stripped down and formal way.<sup>74</sup> This helps explain why property, particularly in its core, is more formal than more personalized contract interpretation where context is more welcome.<sup>75</sup> This communicative trade-off applies to theorizing about the law as well. Utilitarian-speak is formal; it leaves a lot of context and texture out—and this is a real loss—but it makes communication easier. Yes, something is lost in translation but as long as we know what we’re doing—that it is a simplification good for some purposes and not others—it is not so problematic.<sup>76</sup> One can talk like a utilitarian without being one. The morality of property does not depend on it either.

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<sup>73</sup> Alexander, *supra* note 1, at 776 (claiming that material infrastructure is required for human flourishing).

<sup>74</sup> See Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1110–11 (2003).

<sup>75</sup> See *id.*

<sup>76</sup> Many have argued that cost-benefit analysis is only partial, see, e.g., MATTHEW A. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* 25 (2006); see also Peñalver, *supra* note 3, at 853–56 (arguing that cost-benefit analysis tends to discount nonmarket goods and the interests of future generations), but the argument here is a little different. To facilitate communication, the language of cost-benefit analysis can be used cautiously even where we do not believe that it captures the underlying values.

## B. False Dichotomies in Property Mechanisms

Professor Alexander is certainly not alone in arguing for a vision, pluralistic as it is in terms of ends, that leads to an all-or-nothing approach in terms of the means to get there. If any goal is overriding enough, the means are secondary. Sometimes the principal dichotomy in means is characterized as rules versus standards, or formalism versus contextualism. I have argued elsewhere against corner solutions when it comes to formalism and contextualism.<sup>77</sup> Formalism is most usefully understood as invariance to context.<sup>78</sup> Thus the language of mathematics is more formal than English because less use of context is needed for interpretation. No useful system employs no context or makes maximal use of context (whatever that would be); rather, systems fall on a spectrum. Communication is subject to a trade-off in which, at equal cost, one can communicate in an information-packed, intense way with a small audience that has the relevant background knowledge, or one can communicate in a more stripped-down way with an extensive audience.<sup>79</sup> This trade-off occurs in law, in which context is more relevant to the interpretation of contracts than of deeds, and in natural language, in which speakers will use less context-dependent language when there is greater social distance between themselves and their audience. The result is that we get formalism along a sliding scale, in what I have called "differential" formalism.<sup>80</sup>

In a previous article, I have noted how the realists and their successors regard the question of formalism in law as an all-or-nothing proposition.<sup>81</sup> The realists tended to argue that if one had to use context in interpreting a contract some of the time then maximal use of contracting context was desirable all the time.<sup>82</sup> This is fallacious. But law and economics is an heir to legal realism in many respects,<sup>83</sup> and this one is not so different. Some law-and-economics scholars come close to arguing that the virtues of certainty and simplicity dominate almost across the board, at least for commercially sophisticated parties.<sup>84</sup> (Although there may, as I will argue, be more than timing

<sup>77</sup> Smith, *supra* note 74, at 1113.

<sup>78</sup> *Id.*; see also Francis Heylighen, *Advantages and Limitations of Formal Expression*, 4 *FOUND. SCI.* 25, 27, 49–53 (1999) (defining formalism in language).

<sup>79</sup> Smith, *supra* note 74, at 1110–11.

<sup>80</sup> *Id.* at 1157, 1167–90.

<sup>81</sup> *Id.* at 1177–90.

<sup>82</sup> See *id.* at 1180–81.

<sup>83</sup> See Merrill & Smith, *supra* note 64, at 366.

<sup>84</sup> See, e.g., Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 *YALE L.J.* 541, 562 (2003); see also Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 *U. PA. L. REV.* 595, 597 (1995) [hereinafter Schwartz & Scott, *Political Economy*] (arguing that bright-line rules are more likely to benefit interest groups, but that academically oriented reformers prefer such standards). See generally Jason

and discretion separating formal and contextual decisionmaking, the law-and-economics analysis of rules and standards in terms of timing—*ex ante* rules versus *ex post* standards—does leave open some room for standards.)<sup>85</sup> Overall, as Robert Cooter points out, economists tend to view the problem of legal deterrence in terms of prices: liability is a cost to impose on actors to give them the correct *ex ante* incentives for activities.<sup>86</sup> After declaring that the “economic perspective is blind to the distinctively normative aspect of law,”<sup>87</sup> Professor Cooter notes in particular that economists tend to downplay sanctions, which impose discontinuous liability for what is forbidden, and view them as a kind of price.<sup>88</sup> Law is a complex mixture of prices and sanctions, and neither dominates the other. The choice turns in part, as Cooter notes, on whether officials have better information on external harm so that it can be priced or on the correct standard of behavior so that it can simply be backed up with a sanction.<sup>89</sup> Life is not so homogeneous as to call for all of one and none of the other.

Alexander’s flourishing approach shares with much of conventional law and economics an all-or-nothing approach. Because both are more focused on end goals and how to measure them and not on the mechanism used to achieve those ends, they both tend to assume that the mechanism is a homogeneous whole. I have already mentioned the tendency, which flirts with the fallacy of division, to assume that proper parts of the mechanism must share the desirable properties we should be looking for in the whole of property—or the whole of our social institutions—like efficiency, flourishing, virtue-promotion, or justice.<sup>90</sup> Ends-focused theories tend to overlook the richness of the mechanism by which ends are achieved.

In property, exclusion and governance each have their place, giving rise to the familiar core-and-periphery pattern. Exclusion and governance are related to rules versus standards, property rules versus liability rules, sanctions versus prices, and stability versus flexibility. These partially overlapping dichotomies are all a matter of degree and it would be astounding if in a chunk of our social institutions as large as property law, one or the other should dominate the other com-

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Scott Johnston, *Uncertainty, Chaos, and the Torts Process: An Economic Analysis of Legal Form*, 76 CORNELL L. REV. 341 (1991) (discussing and evaluating a range of law-and-economics arguments for greater use of rules).

<sup>85</sup> Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 568–88 (1992) (analyzing rules versus standards in terms of timing of decision making).

<sup>86</sup> Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1524–25 (1984).

<sup>87</sup> *Id.* at 1523.

<sup>88</sup> *Id.* Conversely, he notes that the jurisprudential perspective tends to ignore the power of law in the form of prices to give efficient incentives without the need for official control. *Id.*

<sup>89</sup> *Id.* at 1532–37.

<sup>90</sup> See discussion *supra* p. 969–70.

pletely. The law is characterized by many such dichotomies, and while it is an empirical question how to resolve the dilemma, a best initial guess is that a corner solution—all of one and none of the other—is unlikely to be best for any of them. The big problem with Alexander's approach is not the interests in view but in the rejection of determining proximity between an owner's property and the goal of flourishing up front and across the board. This is a corner solution for standards, and, although it is an empirical question, there are good reasons for thinking no corner solution is right.

### C. More Is Less: Law Versus Equity

There is one dichotomy that might seem to be of historical interest only or subsumable in some other dichotomy like rules versus standards—the (in)famous distinction between law and equity. Although the fusion of law and equity started long before legal realism and is not yet wholly complete (mainly because of the right to jury trial at law and not in equity), legal realism put its characteristic stamp on the way we think about equity now that it is fused into one system with the law.<sup>91</sup>

Some of the early realists realized that rules and standards served different functions. Roscoe Pound, for example, thought that mechanical rules were more important in areas like property and commercial law but that in areas dealing with personal conduct like family law and torts no set rule could be devised *ex ante*.<sup>92</sup> The problem was that Pound did not develop a theory, beyond an intuition about the broad-brush differences in the interests at stake, that would have allowed him to differentiate areas of law further or even justify why one had to take “areas” of law as the unit over which one would make the decision between rules and standards. At the same time, he was quite skeptical of the law and equity distinction that offered an answer to this question but had no apparent theoretical basis, and rather developed out of a series of seeming historically path-dependent ad hoc rules and vague principles.<sup>93</sup> Pound was not impressed with equitable maxims as a tool of decision making.<sup>94</sup>

<sup>91</sup> See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 1000–02 (1987).

<sup>92</sup> Roscoe Pound, *The Theory of Judicial Decision III: A Theory of Judicial Decision for Today*, 36 HARV. L. REV. 940, 951 (1923) (“[R]ules of law . . . which are applied mechanically are more adapted to property and to business transactions; standards where application proceeds upon intuition are more adapted to human conduct and to the conduct of enterprises.”).

<sup>93</sup> Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 26–27 (1905).

<sup>94</sup> Roscoe Pound, *On Certain Maxims of Equity*, in CAMBRIDGE LEGAL ESSAYS 259, 276–77 (Perry H. Winfield & Arnold D. McNair eds., 1926).

Other legal realists objected to equity only in that they wished judges would be more honest and above board about using their discretion to make policy-based decisions. But they did not see discretion as something to be contained in the manner of traditional equity.<sup>95</sup> In public law, equity became a convenient hook for large-scale litigation resulting in structural injunctions to mandate school desegregation and managing prisons that courts found to violate individuals' constitutional rights.<sup>96</sup>

In private law, the spirit of equity appears in courts' attention to context, stringent evaluation under traditional equitable rubrics of unconscionability, and other similar practices. Even codifications like the Uniform Commercial Code are more open-textured and standards-based than the Uniform Sales Act and the traditional common law of contract.<sup>97</sup>

Expanding the equitable approach would be one way to implement Professor Alexander's social obligation norm. But the expansion of equity-style discretion in private law also points to a paradox in practice. When equity becomes available everywhere, those who value stability and certainty will attack it everywhere.<sup>98</sup> Thus, one danger of the "all" prong of the all-or-nothing approach I took issue with in the previous section is that it calls forth the partisans of "none." If "all" or "none" are the only two choices, some who might have been persuaded that some mix of law and equity, of exclusion and social-obligation-inspired governance, would be appropriate will ultimately opt for "none." Or the whole notion of an equitable approach will be hemmed about in others ways, ultimately weakening it. This is the phenomenon of "more is less" identified by Philip Hamburger in the First Amendment Free Exercise context: a wider application of a principle like free exercise can lead to its weakening.<sup>99</sup>

I turn to applications in the next section, but let me suggest that some of the *Sturm und Drang* over *Lucas v. South Carolina Coastal Council*<sup>100</sup> is an example of more is less. *Lucas* held that total economic

<sup>95</sup> See, e.g., Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53, 78 (Summer 1993); Subrin, *supra* note 91, at 1000–01.

<sup>96</sup> See, e.g., Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 46 (1979).

<sup>97</sup> See Schwartz & Scott, *Political Economy*, *supra* note 84, at 618–19, 646–47.

<sup>98</sup> This issue comes up in the dueling opinions in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999). There the majority opinion by Justice Scalia holds that federal courts may not issue preliminary injunctions to freeze unrelated assets in cases in which only money damages are sought because that power did not exist at equity at the time of the Federal Judiciary Act of 1789. See *id.* at 332–33. Justice Ginsburg's dissent would find such power based on the flexibility and generativity of the equity power. See *id.* at 342 (Ginsburg, J., dissenting).

<sup>99</sup> Philip Hamburger, *More Is Less*, 90 VA. L. REV. 835, 837 (2004).

<sup>100</sup> 505 U.S. 1003 (1992).

takings are per se takings unless the regulation prohibits actions that would have been a nuisance at common law.<sup>101</sup> Whether or not total deprivations of economic value should be per se takings, the so-called nuisance exception has received a lot of unfavorable attention.<sup>102</sup> A regulation preventing an owner from doing something he did not have a right to do in the first place is not so controversial. What is controversial is deciding on what is and is not part of the owner's baseline entitlement, with many like Alexander probably hoping that the answer is "not much." The majority opinion by Justice Scalia largely identifies the baseline with state nuisance law.<sup>103</sup> As the dissents point out, nuisance is somewhat protean (especially, one might add, in the *Restatement*, which Justice Scalia even cites) and has been dynamic over time.<sup>104</sup> Furthermore, nuisance is not everything and seems quite constrictive (and therefore expansive for owner's rights) if the idea is that an owner has the entitlement as part of the default package of property rights to commit any actions that do not count as a nuisance at common law. I have argued elsewhere that nuisance as the most governance-like part of the law is an understandable first place to look for a baseline that would be somewhat tailored to particular problems and yet still be constraining, but a robust theory of how custom is part of the law can help define the baseline.<sup>105</sup> Even nuisance itself contains per se and balancing aspects, despite the emphasis on the latter in the *Restatement* and its commentary.<sup>106</sup> If this richer picture of nuisance and other sources of law, including equity in its domain, were available, it is at least an open question whether the temptation to straitjacket the dynamic aspect of the baseline in takings law would be quite as pronounced as it is. Fans of rules—a theme of Justice Scalia's jurisprudence<sup>107</sup>—will opt for even the straightest of straightjackets

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<sup>101</sup> See *id.* at 1031–32.

<sup>102</sup> See, e.g., Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 323, 333–34 & n.75, 367 (2005) (noting that contextual analysis in nuisance law is in tension with the categorical approach to takings in *Lucas*); William W. Fisher III, *The Trouble with Lucas*, 45 STAN. L. REV. 1393, 1407 (1993) (“[W]hat is most striking about the holding of *Lucas* is that it embeds in the already muddy law of takings . . . the even muddier law of nuisance.”).

<sup>103</sup> See *Lucas*, 505 U.S. at 1031–32.

<sup>104</sup> See *id.* at 1054–55 & n.19 (Blackmun, J., dissenting); *id.* at 1068–70 (Stevens, J., dissenting).

<sup>105</sup> Henry E. Smith, *Community and Custom in Property*, 10 THEORETICAL INQUIRIES L. 6, 36–37 (2009).

<sup>106</sup> Smith, *supra* note 35, at 992–93.

<sup>107</sup> See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–80 (1989). Caleb Nelson argues that Scalia's textualism is best seen as a preference for rules over standards. See Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 350 (2005); Caleb Nelson, *A Response to Professor Manning*, 91 VA. L. REV. 451, 467 (2005). But see John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 424 (2005) (arguing that originalism is not reducible to a preference for rules over standards). See generally Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Stan-*

when the alternative is leaving everything up for grabs. In property as elsewhere, some *ex ante* decision making about the degree to which we want to use rules and standards can give the proponents of stability some assurance at this meta-level so that sweeping super-formalist approaches are not as attractive.

Although it is far too large a topic for an essay like this one, I would like to suggest that the use of equity-style decision making, even in the service of social obligations and human flourishing, runs a similar danger. If these principles apply across the board, the tendency will be to weaken them not only where they are the most difficult to reconcile with the basic stability of the property system (the "core") but more uniformly. At least in theory, equity allowed a very strong approach to overreaching and strategic behavior by private parties but did so in a defined sphere. Equity acted in personam would not give a remedy if the law was adequate and relied heavily on how well informed the actors were (in terms of notice and good faith, for example).<sup>108</sup> Whether these limits worked or not, I would argue that it is worth asking whether something similar could channel judicial intervention in the name of fairness and morality in order to increase and concentrate the firepower where it is most needed and where judges are really the solution rather than part of the problem.

#### IV

#### APPLICATIONS

Because I have argued that the compromises involved in the core-and-periphery, exclusion-and-governance approach to property involve empirical questions, it is worthwhile to consider some of Professor Alexander's examples. Because he eschews any up-front and across-the-board judgments, it is difficult to evaluate some of his applications,<sup>109</sup> but I will argue that they are better handled under a regime that gives presumptive weight to owners' exclusion rights and to traditional legal categories than under his alternative.

At the outset, I take Alexander to be engaged in a mostly normative exercise. Otherwise, his characterization of the law is strange. The risk is a sort of casebook-ism in the approach to law: whatever is the maximum result in terms of overturning existing categories in favor of what can be characterized as social obligation forms the new outer contour of the law—no matter how atypical any of these results

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dards, 106 HARV. L. REV. 24, 26–27 (1992) (explaining that politics might drive the distinction between rules and standards).

<sup>108</sup> See 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 2.3(2), at 77, § 2.5, at 123 (2d ed. 1993); SNELL'S EQUITY 86–90, 95, 108–10 (John McGhee ed., 31st ed. 2005).

<sup>109</sup> Alexander *supra* note 1, at 776–777, 780–82, 794–96, 800–01, 804–810.

may be. On this view, we have a one-way ratchet to increasing interventionism, with no brakes on the train. And if nothing is decided “up front and across the board” and in particular if owners’ exclusion rights have no presumptive force, one’s imagination is the only limit.

For example, Alexander cites the solar collector case of *Prah v. Maretti*<sup>110</sup> as an established contour of nuisance law.<sup>111</sup> This is far from being the case. *Prah* holds that that blocking a solar collector’s access to sunlight is actionable as a nuisance,<sup>112</sup> but it is one of only two cases that show any openness to this possibility—the rest reject nuisance liability *per se*.<sup>113</sup> English common law doctrine of “ancient lights” gave landowners whose windows had unobstructed access to sunlight for a certain period (generally twenty years)<sup>114</sup> a permanent easement, but this doctrine was firmly rejected in the United States.<sup>115</sup> For one thing, it encourages those who would like to acquire an easement to build faster (less of a problem in a built-up country like England).<sup>116</sup> The facts of *Prah* itself make one wonder if the owner of the solar collector built partly to preclude his neighbor’s building

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<sup>110</sup> 321 N.W.2d 182 (Wis. 1982). Alexander is not alone in considering the case important even though it is quite the outlier.

<sup>111</sup> Alexander, *supra* note 1, at 754.

<sup>112</sup> 321 N.W.2d at 191.

<sup>113</sup> The other is *Tenn. v. 889 Associates, Ltd.*, 500 A.2d 366, 369 (N.H. 1985) (Souter, J.) (recognizing a nuisance claim for interfering with access to air and light). The more typical approach is exemplified by *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357, 359 (Fla. Dist. Ct. App. 1959) (denying a legal right to the uninterrupted flow of air and light from a neighbor’s land); see also WILLIAM B. STOEUBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* § 8.5, at 448 (3d ed. 2000) (citing *Fontainebleau Hotel Corp.* to show that courts typically do not recognize necessity easements for light and air).

<sup>114</sup> See *Fontainebleau Hotel Corp.*, 114 So. 2d at 359.

<sup>115</sup> The court’s statement in *Prah* that “American courts have not been as receptive to protecting a landowner’s access to sunlight as the English courts,” 321 N.W.2d at 188, is quite the understatement.

<sup>116</sup> The concern about racing is closely related to the lack of notice of claims of a prescriptive easement to light. See *Stein v. Hauck*, 56 Ind. 65, 69–70 (1877), in which the court noted:

[T]he owner of open space may not know, and can not know of right, the internal arrangement of his neighbor’s house; and may “stand by” while the invading claim, which is finally to embarrass, if not to destroy, the usefulness of his land, is gradually accruing against him, until it becomes a vested right, which he can not dispute.

... [I]f he knows that the right is accruing against him, he has no right of action against the person who enjoys his light or air, to prevent it, because he has not, and can not have, any exclusive property in the light or air which occupies his space; he has nothing, therefore, to do, except to stand by and lose his rights, or erect his obstruction within a given time, simply for the purpose of protecting what was already his own. . . .

....

... No one should stand in danger of unwittingly suffering burdens to be laid upon his property, nor be constantly compelled to guard against such an insidious invasion of his rights.



plans.<sup>117</sup> Where such behavioral responses fit into a theory of social obligation or human flourishing is unclear. Moreover, the whole class of “noninvasive” nuisances shares the problem of lack of notice to the duty holder;<sup>118</sup> owners have little clue as to what *ex post* meritorious land use their neighbor will come along with that will cut into their right to build.<sup>119</sup> The *Prah* court’s invocation of protection for bargained-for easements for sunlight and prohibition of spite fences do not implicate these problems.<sup>120</sup> It is also unclear what happens when solar collectors come into conflict with redwoods trees as has happened recently in California.<sup>121</sup> There a statute favors solar collectors, but cutting down redwoods seems problematic from an environmental point of view and led to subsequent non-retroactive legislation protecting preexisting redwoods that block solar panels. The traditional approach of requiring landowners who want an easement protecting their access to light to negotiate for it *ex ante* starts looking better and better no matter what view of flourishing one adopts.

What makes *Prah* particularly problematic is the rhetoric it uses in dismissing the traditional approach. The court treats the presumptive deference to owners as a relic of the nineteenth century.<sup>122</sup> The only argument the court sees favoring this deference is an outmoded policy of favoring the development of land.<sup>123</sup> This misconceives how property works and the role of the basic package of owner rights in furnishing the emergent properties of stability and coordination, with the court reflexively reaching for a legal realist conception of everything being constantly up for grabs. Like Alexander, the court sees the law’s protection of landowners as ready at all times to give way to regulation, with the increasing importance of sunlight and the decreased importance of development (in the court’s view) as justifying the result.<sup>124</sup>

Another exhibit in Alexander’s gallery of social-obligation-inspired decisions partakes of this pernicious case-by-case ad hocery, even though, unlike *Prah*, it reaches the right result. In *State v. Shack*, the New Jersey Supreme Court held that aid workers seeking to visit

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<sup>117</sup> 321 N.W.2d at 185 (noting that the owner of the solar collector built his home first and did not build in the center of the lot).

<sup>118</sup> *Id.* at 199 (Callow, J., dissenting) (noting that the record does not indicate whether the owner of the solar collector notified the defendant of the circumstances of the collector before the defendant purchased the property or sought protection for the collector before the defendant submitted building plans); Smith, *supra* note 35, at 996–97, 1016–18.

<sup>119</sup> Smith, *supra* note 35, at 996–97, 1016–18; see also Stein, 56 Ind. at 69–70.

<sup>120</sup> 321 N.W.2d at 188–89.

<sup>121</sup> Felicity Barringer, *In California Neighbors’ Dispute, Officials Find It’s Time to Speak for the Trees*, N.Y. TIMES, July 23, 2008, at A13.

<sup>122</sup> *Prah*, 321 N.W.2d at 189.

<sup>123</sup> *Id.* at 189–91.

<sup>124</sup> *Id.* at 189–90.

migrant farm workers would not be trespassers if they visited workers who desired them as visitors, despite the farmer-landowners' objections.<sup>125</sup> Nevertheless, the court declared that property serves human ends and came close to saying that it would evaluate all problems in a largely *ex post* manner with no presumptive weight for legal categories of any kind, much less owners' exclusion rights.<sup>126</sup> The court realized it could have reached a similar result by holding that this was a landlord-tenant relationship and that the tenants had a right to receive guests.<sup>127</sup> If need be, this could be taken as a mandatory rule (or a default rule subject to onerous requirements for contracting around).<sup>128</sup> Perhaps more robust solutions to this problem are for legislatures, which can amend the trespass statute in the long run.<sup>129</sup> Instead, in its most remarkable statement, the court declared that:

We see no profit in trying to decide upon a conventional category and then forcing the present subject into it. That approach would be artificial and distorting. The quest is for a fair adjustment of the competing needs of the parties, in the light of the realities of the relationship between the migrant worker and the operator of the housing facility.<sup>130</sup>

This is about as unlike the architecture of property as it can be, in terms of exclusion and governance, and a *numerus clausus* of categories in the interests of third-party information costs.<sup>131</sup> Indeed, the *Shack* court gives zero weight to the informational and other advantages of legal categories like leases. When Alexander and others see *State v. Shack* as a paradigm of how to decide property cases, they are advocating removing any presumption in favor of owners' exclusion rights.<sup>132</sup> It is hard to disagree that the common law has the resources to make public policy exceptions to trespass and the right to exclude more generally,<sup>133</sup> but the question is how many exceptions to make

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<sup>125</sup> 277 A.2d 369, 374–75 (N.J. 1971).

<sup>126</sup> *Id.* at 372 ("Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises.").

<sup>127</sup> *Id.* at 373–74.

<sup>128</sup> In addition, a court of equity should deny a request for an injunction preventing such trespasses because of the landlord's overreaching behavior.

<sup>129</sup> 720 ILL. COMP. STAT. ANN. § 5/21-3(c) (West Supp. 2008) ("This Section [of the criminal trespass statute] does not apply to any person . . . invited by [a] migrant worker or other person so living on such land to visit him at the place he is so living upon the land.").

<sup>130</sup> *Shack*, 277 A.2d at 374.

<sup>131</sup> See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 4, 33 (2000).

<sup>132</sup> See, e.g., JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY § 2.3.4, at 39 (2005) (identifying social need as a justification for intruding onto private property); Peñalver, *supra* note 3, at 883–84.

<sup>133</sup> SINGER, *supra* note 132, § 1.3.4, at 39 ("Many privileges to intrude upon private land exist as a balance between the rights of the occupant to freedom from intrusion and the needs of society to impose reasonable burdens upon such land for the general wel-

given the presumption for the right to exclude. Using a generalized balancing test where ultimate ends are constantly in view, as the *Shack* court claimed it was doing, would be quite a startling innovation.

Again, one suspects that much of what is going on here—in the courts, not for Alexander—is a matter of rhetorical strategy. Life goes on much as it did before, partly because even the New Jersey Supreme Court does not take this approach literally. Landowners still do have some presumptive right, which is indirectly reflected in the New Jersey courts' caution in the leafletting cases. A private university that has a policy of openness cannot exclude a peaceful leafletter, but a commercial trade school can.<sup>134</sup> If the New Jersey Supreme Court has developed a doctrine that owners who invite others onto their property cannot reasonably exclude others,<sup>135</sup> this has the potential to make every invocation of the right to exclude a matter of *ex post* balancing, except in the case of hermits.<sup>136</sup> One wonders how it promotes human flourishing to mandate that casinos permit access to card counters unless the casino commission bans them.<sup>137</sup> I for one would

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fare.” (quoting Clyde O. Martz, *Rights Incident to Possession of Land*, in VI-A AMERICAN LAW OF PROPERTY pt. 20, § 28.10, at 31 (A. James Casner ed., 1954))).

<sup>134</sup> Compare *State v. Schmid*, 423 A.2d 615, 630, 633 (N.J. 1980) (holding that a private university with a policy of open access cannot exclude peaceful leafletters), with *State v. Guice*, 621 A.2d 553, 554, 556 (N.J. Super. Ct. Law Div. 1993) (holding that a private trade school without a policy of open access can exclude individuals who intend to distribute political literature).

<sup>135</sup> *Schmid* comes the closest to articulating a “test” for such a principle, requiring a court to consider: “(1) the nature, purposes, and primary use of such private property, generally, its ‘normal’ use, (2) the extent and nature of the public’s invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property.” 423 A.2d at 630; see also *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners’ Ass’n*, 929 A.2d 1060, 1072–73 (N.J. 2007) (quoting and applying the *Schmid* standard to a common-interest community and finding no free-speech violation).

<sup>136</sup> It is worthwhile to note that New Jersey also defines “public accommodation” very broadly. See *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1210, 1218 (N.J. 1999) (describing the test for public accommodation and finding that the Boy Scouts is a place of public accommodation), *rev’d*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Uston v. Resorts Int’l Hotel, Inc.*, 445 A.2d 370, 376 (N.J. 1982).

<sup>137</sup> *Uston*, 445 A.2d at 376. Nor does the court’s pro-card-counting result gain much support from the need to combat racial and other invidious discrimination. Besides being wildly untailored to fulfill that goal, we have laws that address discrimination more directly. Nor is the court’s reasoning strengthened by its implication that the right of businesses to exclude customers has its origins in racial discrimination. *Id.* at 374 n.4. The history of the contours of public accommodations requirements is quite contested, compare A.K. Sandoval-Strausz, *Travelers, Strangers, and Jim Crow: Law, Public Accommodations, and Civil Rights in America*, 23 LAW & HIST. REV. 53, 62–74 (2005) (arguing that by mid-nineteenth century the common law imposed special duties to serve only on businesses that served travelers), with Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1312–31 (1996) (contending that before the Civil War all businesses open to the public were subject to a duty to serve); see generally MERRILL & SMITH, *supra* note 31, at 445–47, but it is quite doubtful that the court (or Alexander) would be willing to judge other laws, such as various labor regulations, on the original motivations of their

allow casino owners to control that little patch of grass.<sup>138</sup> Perhaps all this represents a fine sense of the balance of policy, but I suspect that the gravitational pull of the core property rights is doing a lot of unacknowledged work in cases like this. It is hard to say, and that is the problem.

The direct social-obligation theory also countenances some very dubious results from an environmental point of view. Alexander buys into the conventional wisdom too much when he gives hesitating approval to the decision in *Boomer v. Atlantic Cement Co.*<sup>139</sup> From an *ex post* point of view—Alexander's preferred vantage point—it is true that an injunction to shut down a polluting factory looks wasteful and threatening to jobs. The New York Court of Appeals thus rejected the rule of almost automatic injunctions in pollution cases in favor of permanent damages.<sup>140</sup> One might think that overcoming exclusion rights is the theme here rather than human flourishing because injunctions or damages are not the only options. I am at a loss as to why we have to accept that the plant was correctly located. Even if ultimately the landowners' rights to be free from pollution—part of their default package of rights—have to give way to economic progress and even if negotiating an easement would involve prohibitive transaction costs, there is little reason we could not require the cement company to justify itself to a public authority before building.<sup>141</sup> Most statutes that allow private landowners to exercise a mini-*eminent domain* for access to roads or water require them to demonstrate *ex ante* that acquiring an easement by paying compensation (the liability rule) is in the public interest.<sup>142</sup> Requiring a hearing in the *Boomer* situation before the company built the factory, at which the homeowners would have a right to appear and make the case that there are better sites for the plant, avoids this *ex post* dilemma and provides greater protection

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proponents. See, e.g., DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL (2001) (documenting purpose of racial exclusion behind a variety of early labor regulations).

<sup>138</sup> Running a casino, like most things, is harder than it looks. See Lawrence S. Ritter, *On the Fundamental Role of Transactions Costs in Monetary Theory: Two Illustrations from Casino Gambling*, 10 J. MONEY, CREDIT & BANKING 522, 524–28 (1978) (economic analysis of trade-off between speed and losses from lack of change-making in context of casino betting).

<sup>139</sup> 257 N.E.2d 870 (N.Y. 1970); Alexander, *supra* note 1, at 779–80.

<sup>140</sup> *Boomer*, 257 N.E.2d at 872–73.

<sup>141</sup> Smith, *supra* note 35, at 1037–45. Because of its access to raw materials and transportation on the Hudson River, the general Albany area contained cement plants; Atlantic Cement built its factory in an unzoned neighborhood filled with small houses and businesses owned by individuals unlikely to have any political influence. Daniel A. Farber, *The Story of Boomer: Pollution and the Common Law*, 32 ECOLOGY L.Q. 113, 115 (2005).

<sup>142</sup> See, e.g., WYO. STAT. ANN. §§ 24-9-101, 24-9-103 (2007) (describing conditions and procedures for applying for a private road, including “[a] specific statement as to why the land has no legally enforceable access”).

for both the homeowners' default package of rights and the human flourishing it promotes—here rather directly, I might add. The point is that there is a wide array of mechanisms to serve the ends of human flourishing and weakening the residents' rights need not be done roughshod as in *Boomer*.

Alexander happily invokes the public trust and not surprisingly so. The public trust makes direct reference to certain interests important to the public, although these are traditionally narrow categories such as navigation and related uses.<sup>143</sup> Alexander taps into a recent line of scholarship and some case law that expands the public trust.<sup>144</sup> The interests protected are important, but the public trust does suffer from great indeterminacy and acts as a sword hanging over landowners, particularly in the context of water rights.<sup>145</sup> But Alexander focuses on beach access. As is well known, there are multiple approaches to giving the public rights to access dry sand areas of beaches, but Alexander likes the public trust and the use to which the New Jersey Supreme Court (again) put it in the case of *Matthews v. Bay Head Improvement Association*.<sup>146</sup> As with historic preservation, it is not clear why even if public beaches are important to human flourishing governments shouldn't be required to compensate owners for taking them. The public trust avoids compensation by (re)defining the baseline of who owns what.<sup>147</sup> Alexander invokes the pathbreaking work of Carol Rose on inherently public property, but Professor Rose herself is ambivalent about how far the comedy of the commons—the idea that some uses are better the more people engage in them—extends to beaches or whether beachfront landowners should be compensated.<sup>148</sup>

Without wading too far into these waters, I would like to raise some questions as to how Alexander applies the social-obligation theory to this problem. Why put the burden on beachfront landowners instead of allowing people to sue localities for local beaches? Alexan-

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<sup>143</sup> Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 702, 706 (2006); Joseph L. Sax, *The Public Trust Doctrine on Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 556 (1970).

<sup>144</sup> Alexander, *supra* note 1, at 802–04.

<sup>145</sup> See, e.g., *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 712, 732 (Cal. 1983) (holding that the public trust doctrine is an appropriate basis for an administrative decision to allocate water from an "imperiled" mountain lake).

<sup>146</sup> 471 A.2d 355, 369 (N.J. 1984) (holding that the public trust doctrine establishes an easement over "quasi-public lands" for public to access beach); Alexander, *supra* note 1, at 802–04.

<sup>147</sup> See James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527, 532–34, 565–68 (1989); Klass, *supra* note 143, at 752–53; Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1507–08 (1990).

<sup>148</sup> Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 780–81 (1986).

der notes how planner Robert Moses built bridges too low to allow buses from cities to access beaches in order to keep poor people away from them.<sup>149</sup> Why not let plaintiffs sue to enjoin such bridge construction in the future or even to sue now to have Robert Moses's bridges torn down? The bridges would not count as spite fences under current law because they serve a function other than the exclusionary one, but then why not "expand" this category? This would certainly send a message to future discriminatory public authorities. The bad motive makes them symbols of oppression, and it can be highly inequitable to allow government's misfeasance to create obligations in private landowners (unless they had some special force behind Moses's building program). Here as elsewhere we need a more global view to know about ultimate justice, but courts in a beach access case are not the best forum for resolving these questions, unless we already assume that owners are the ones who always need whacking.

Returning to the problem of behavioral responses I raised in connection with solar collectors, the incentives of mandating beach access because of a lack of public beaches can be problematic too.<sup>150</sup> Interior landowners have an incentive to oppose public beaches because the courts will seize beachfront owners' property for the missing public beaches. This is perverse. This is one reason to allow at least compensation, but it also calls into question the specific in-kind quasi-corrective justice view of the obligations of ownership where it is always the owner and his seemingly selfish exclusion rights that are the obstacle to social justice. Without more of a theory of why this larger context is irrelevant, it looks as if there is an "up-front and across-the-board" decision that landowners are always the problem.

Indeed, on the benefits side Alexander seems to slip generally into an up-front and across-the-board approach. Why is a public library an easy case in terms of human flourishing?<sup>151</sup> One might say that it is easy as a "public use," but why is building a public library always the best way to promote human flourishing? Systematic land reform may well be better than ad hoc, *ex post* blessing of squatting, as Alexander suggests,<sup>152</sup> but isn't this an *ex ante* across-the-board solution? Why is the achievement only of social obligation-style benefits permissible in a sweeping manner? Why aren't the benefits of stability to be achieved that way (especially when there is empirical evidence

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<sup>149</sup> Alexander, *supra* note 1, at 805 n.234 (citing Langdon Winner, *Do Artifacts Have Politics?*, 109 DAEDALUS 121, 123–24 (1980)).

<sup>150</sup> Alexander, *supra* note 1, at 804.

<sup>151</sup> *Id.* at 781–82.

<sup>152</sup> *Id.* at 790–91.

that some package of stable property rights is beneficial)?<sup>153</sup> *Ex ante* delegation to owners with a (rebuttable) presumption in favor of permitting them to exclude outsiders is part of the infrastructure for human flourishing and so should benefit from the preference for sweeping benefits (if there is one).

Alexander seems to have in mind a different corner of the takings jurisprudence in the background: the rate-setting cases.<sup>154</sup> At various points in his article, he says that it is all right to override the owners' rights because they are getting a reasonable rate of return.<sup>155</sup> This is a regulated-industries approach, and given the nightmarish quality of the rate-setting problem with its valuations and definitions of cost, it is hard to see why this should become a general model for ownership.<sup>156</sup> In an interconnected world, as opposed to a single industry characterized by natural monopoly, these rate-setting questions would balloon in number and difficulty (and would be about the least modular way imaginable to solve the problem). Indeed, falling into a rate-setting regulated industries vision is one of the least attractive and least realistic aspects of the U.S. Supreme Court's decision in *Penn Central*.<sup>157</sup> Generalizing it would lead to all the problems of opportunism and uncertainty that I argue would bedevil the large-scale use of liability rules in property law.<sup>158</sup>

## CONCLUSION

Alexander's theory is another chapter in the long history of legal realism. He is right that much of law and economics is too one dimensional at the level of ends. But he does not carry the critique far enough. Like legal realism and law and economics, his theory is too homogeneous in not distinguishing enough between ends and means. The structure of property in terms of a core and periphery, or exclusion and governance, is no accident and constitutes no denial of his

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<sup>153</sup> See, e.g., Acemoglu et al., *supra* note 63, at 1395 (concluding that European colonial settlements with secure property-rights systems developed stronger economies than settlements with extractive institutional arrangements); Simon Johnson et al., *Property Rights and Finance*, 92 AM. ECON. REV. 1335, 1354 (2002) (finding, based on a study of post-communist nations, that lesser property rights protections cause firms to reinvest in the market at a lower rate); Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503, 523 (2001) (presenting findings suggesting that common law countries experience higher growth than civil law countries through greater security of contract and property rights).

<sup>154</sup> See, e.g., *Duquesne Light Co. v Barasch*, 488 U.S. 299, 301–02 (1989) (holding that a Pennsylvania law preventing electricity providers from setting utility rates to reflect investments in as-yet-unused plant did not violate the Takings Clause of the Fifth Amendment).

<sup>155</sup> See, e.g., Alexander, *supra* note 1, at 794–95.

<sup>156</sup> See *Duquesne Light Co.*, 488 U.S. at 314 (“The economic judgments required in rate proceedings are often hopelessly complex . . .”).

<sup>157</sup> *Penn Cent. Transp. Co. v. N.Y. City*, 438 U.S. 104, 121 n.23, 136 (1978).

<sup>158</sup> Smith, *supra* note 43, Part III.

persuasive case that the ends property law serves are plural and can be fruitfully thought of in terms of human flourishing. But when it comes to the gap between these ultimate ends and some of property's means for getting there, we have to be open to the possibility that sometimes ends are best pursued indirectly.



